DOCKET FILE COPY ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CC Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	
	)	

REPLY COMMENTS OF
OHIO EDISON COMPANY
AND UNION ELECTRIC COMPANY

Submitted by:

OHIO EDISON COMPANY
and
UNION ELECTRIC COMPANY

Rick C. Giannantonio, Esq.
John F. Hamilton
Ohio Edison Company
76 South Main Street
Akron, Ohio 44308
(330) 384-5893
(314) 554- 2514

William J. Niehoff, Esq.
Union Electric Company
1901 Chouteau Avenue
P.O. Box 66149 (M/C 1310)
St. Louis, Missouri 63166-6149
(314) 554- 2514

John H. O'Neill, Jr.
Paul A. Gaukler
Norman J. Fry
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8304

Their Attorneys

September 26, 1997

Ohio Edison Company
Union Electric Company
October 21, 1997

TABLE OF CONTENTS

Ohio Edison Company
Union Electric Company
October 21, 1997

EXECUTIVE SUMMARY

These joint reply comments of Ohio Edison Company ("Ohio Edison") and Union Electric Company ("Union Electric") (collectively referred to as "Utilities") respond to various specific assertions raised in the comments filed by other parties. To the extent specific comments of other parties are not addressed, Utilities rely upon their initial comments in this Docket and their comments in Docket No. 97-98.

The proportional use test proposed by the cable companies under which the number of cable TV pole attachments to be charged rates under section 224(e) would be equal to the proportion of their customers being provided telecommunication services would greatly understate the number of attachments used to provide telecommunications services and therefore violates the statutory prescription that Section 224(d) rates are to be limited to pole attachments used "solely to provide cable service." 47 U.S.C. § 224(d)(3). Further, the provision of internet services by cable operators does not constitute cable service and, accordingly, pole attachments used to provide internet services are not entitled to Section 224(d) rates.

AT&T's position that cable operators using their attachments solely for cable services should nevertheless be treated as attaching entities for the purpose of allocating 2/3 of the cost of unusable pole space is wrong. It is contrary to the structure and intent of Section 224(e) and would result in electric utilities bearing more than 1/3 of the cost of unusable pole space contrary to the mandate of Section 224(e)(2).

The position of ICG Communications, Inc. that communication attachments should only be allocated six inches of usable pole space ignores numerous practical

considerations that dictate a minimum allocation of one foot of usable space for communication attachments. Similarly, MCI's position that usable pole space should be artificially increased by one foot for each potential overlashed facility is contrary to the provisions of Section 224(e) and would lead to unreasonable results, such as, for example, a utility being responsible for the cost of installing a taller pole even though it was only being reimbursed for the cost of 1/3 of the usable pole space. Similarly, there is absolutely no basis to MCI's position that the apportionment of usable pole space is to mirror the allocation of the cost of unusable pole space in Section 224(e)(2).

WinStar and Teligent's position that rights-of-way should be defined to include access to roof tops is not a proper issue for this Docket, has been previously rejected by the Commission, and is without merit.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CC Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	
	)	

REPLY COMMENTS OF OHIO EDISON COMPANY AND UNION ELECTRIC COMPANY

INTRODUCTION

Ohio Edison Company ("Ohio Edison") and Union Electric Company ("Union Electric"), by their attorneys and pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1994) and the Commission's Notice of Proposed Rulemaking (the "NPRM") in the above-captioned docket released August 12, 1997, hereby submit their Reply Comments.

The NPRM concerns proposed amendments to the Commission's rules to implement Section 703 of the Telecommunications Act of 1996 (the "1996 Telecommunications Act" or the "1996 Act") which amended Section 224 of the Communications

Act of 1934 (the "1934 Act") (referred to together as "the Act"). The NPRM seeks comment on proposed rate formulas for determining rates pursuant to Section 224(e) of the Act for pole attachments and conduit used by cable systems and telecommunication carriers to provide telecommunication service. The NPRM also seeks comment on whether it should develop a similar methodology for rates to be charged for use of rights-of-way.

Ohio Edison and Union Electric (referred to collectively as "Utilities") filed separate comments in response to the NPRM dated September 26, 1997 directed towards the proposed rate formulations as they would apply to electric utilities that own poles, conduits and rights-of-way. In these joint reply comments, Utilities will not repeat their initial comments but will focus on providing additional information and responses to certain specific assertions raised in various comments filed by other parties with respect to the NPRM. To the extent specific comments of other parties are not addressed herein, Utilities rely upon their initial comments filed with respect to the current NPRM as well as their separate comments filed with the Commission concerning Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, FCC 97-94, CS Docket No. 97-98 (March 14, 1997) ("March 1997 Pole Attachment Notice") which, as set forth in their initial comments, are expressly incorporated by reference with respect to the current NPRM.

Ohio Edison Company
Union Electric Company
October 21, 1997

REPLY COMMENTS

A. Rates For Cable Television Attachments Used To Provide Services In Addition To Cable Television Service

As set forth in Utilities' initial comments, the 1996 Telecommunications Act limits the application of the subsidized rates under Section 224(d) to those attachments made by cable television systems that are used solely for the provision of cable services.[1/] This limitation is expressly set forth in the first sentence of Section 224(d)(3) which provides that rates under Section 224(d) will only apply to "any pole attachment used by a cable television system solely to provide cable service."[2/] Thus, the 1996 Telecommunications Act clearly mandates that subsequent to February 8, 2001, the effective date for rates under Section 224(e), cable operators are to be charged rates under Section 224(e) for those pole attachments used to provide telecommunication service even if those attachments are also used to provide cable service.

The cable companies would have the Commission ignore this clear statutory directive. For example, both the National Cable Television Association ("NCTA") and Comcast argue that, where a cable company provides both cable and telecommunication service, the number of pole attachments to be charged rates under Section 224(e) should be equal to the proportion of cable company customers that are provided telephone services.[3/] Therefore, if a cable company has 10,000 customers of which 1,000

[1/] Ohio Edison Comments at 19-23; Union Electric Comments at 19-22.

[2/] 47 U.S.C. § 224(d)(3) (emphasis added).

[3/] Comments of the National Cable Television Association at 22-24; Comments of Comcast Corporation, et al. at 15-17.

receive phone service, the cable company would be charged rates under Section 224(e) for 10% of its pole attachments and rates under Section 224(d) for the remaining 90% regardless of the number of attachments used to provide telecommunication services.

Such an approach is contrary to the express statutory language of Section 224(d)(3) that rates under Section 224(d) apply only to pole attachments used "solely to provide cable service." It would base cable company rates on the success of a cable company's marketing of telecommunication services and not actual pole use as required by the Act. Moreover, it would place other providers of telecommunication services at a competitive disadvantage vis-a-vis cable companies because it would allow cable companies to deliver telecommunication services using pole attachments charged at subsidized, lower rates than those charged other telecommunication providers.

The cable companies claim that their proposed proportional use test is necessary because, upon providing telecommunication services, telecommunications data will be propagated throughout a cable company's entire system regardless of whether particular customers subscribe to the cable company's phone service. According to the cable companies, it would be unfair in such situations to charge the higher 224(e) rate for all their attachments and that keeping actual count of the poles used to provide telecommunication services to particular customers would be a large administrative burden, particularly as individual customers added or removed telecommunication services.

The situation described by the cable companies is, however, no different than that faced by a competitive access provider seeking to provide telecommunication

service in a particular community. Such a provider is not going to put up and take down attachments each time it adds or drops a customer. Rather, the economical approach would be to install its system throughout the community to compete with other providers of telecommunication services in the community. Accordingly, a competitive access provider would be paying 224(e) rates for attachments located throughout most, if not the entire community. The cable companies' proportional use test would place such providers at a large competitive disadvantage, doubly so taking into account that cable companies receive cable revenues as well as telecommunication revenues to offset the costs of their pole attachments.

Thus, it does not unfairly burden cable companies to require them to keep records of those pole attachments that they actually utilize to provide telecommunication services to the extent they desire to maintain the subsidized 224(d) rate on attachments used solely to provide cable service. Rather, it simply ensures that the statutory mandate is effectuated and that cable companies cannot further aggrandize the subsidies they already receive under the Act.[4/]

[4/] Further, because of the inability of an electric utility to verify the extent to which a cable company is providing telecommunication services, Utilities believe that it would be reasonable for an electric utility, upon the initiation of telephone service by a cable operator, to charge Section 224(e) rates for the cable operator's entire network absent a demonstration of some physical impediment from its being able to provide such service in parts of its network. As discussed above, this would be similar to the charges that a competitive access provider would need to pay in order to market telecommunication service in a particular community. Further, as discussed below, a cable operator will in fact be utilizing the great majority of its attachments to provide telecommunication services even if it has a low percentage of the local market.

Moreover, even assuming some approximation were appropriate, the approximation suggested by NCTA and Comcast would significantly understate the number of attachments used to provide telecommunication services. It ignores that many attachments are necessary just to provide access to individual subdivisions and developments. To take a simple example, assume that 100 poles are used to deliver electricity to, and another 100 poles are used to distribute the electricity throughout, a subdivision or development. Under the cable companies proposed proportional test, assuming 10% of the persons in the development subscribed to the phone service offered by the cable company, the cable company would pay the electric utility for only 20 pole attachments when clearly 100 plus pole attachments are being used by the cable company to provide telecommunication services within the development.

The complete inappropriateness of the cable companies' proposed proportional use test becomes even more apparent if one assumes that the electricity is delivered throughout the subdivision or development by underground wires, which is often done for both safety and aesthetics. In that situation, the only pole attachments used by the cable company would be those on the 100 poles necessary for the cable lines to reach the development. All 100 of these attachments would be used for providing telecommunication services if only a single house in the subdivision or development subscribed to the phone service offered by the cable company. Thus, clearly the proportional use test proposed by the cable companies would violate the express statutory mandate of Section 224(d)(3) that subsidized rates under Section 224(d) are to apply only to those pole attachments used "solely to provide cable service."

NCTA and Comcast also argue that the provision of internet access services by cable companies should be construed as providing cable services and not telecommunication services, and therefore subject to the lower rates of Section 224(d). This position is, however, as the Commission recognizes, directly contrary to the provisions of the Act defining cable services and to the overall purpose of the 1996 Telecommunications Act "to provide for a pro-competitive de-regulatory national policy framework" for the provision of telecommunications and related services.[5/] The cable companies' position would allow them to benefit from subsidized pole attachment rates and provide them with an unfair competitive advantage in competing with other providers of internet access services, which is an intensely competitive market place. There is absolutely no reason why the Commission should bless and favor cable companies with subsidized rates in their intense competition with other internet access service providers. It would simply result in the government showing favor for one class of competitors over another and would be directly contrary to the intent of the 1996 Telecommunications Act for establishing a "pro-competitive de-regulatory national policy framework" for the provision of telecommunications and related services.[6/]

The Commission has correctly recognized in the NRPM that the provision of "Internet access" by cable operators is something "other than cable service." NPRM ¶ 15. The Act defines cable service as follows:

[5/] H.R. Rep. No. 104-458, at 1 (1996)

[6/] This favored treatment could also extend to direct competition between cable companies providing internet services and long distance telecommunication carriers, given the capability to communicate by voice over the internet and the speculation by some that voice communication over the internet may some day replace long distance telephone communication.

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. § 522(6). Thus, the definition of "cable service" is limited to traditional television video programming and "other programming services," which in turn is defined to mean "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). Internet service access is not included within this definition. It is not programming information nor is it available to all subscribers generally. Rather, it is providing telecommunication-type access to specialized services and information provided by others -- not the cable operator -- and is made available only to those cable television subscribers that also subscribe or pay for the internet access service provided by the cable operator.[7/]

In short, the provision of internet access service does not constitute cable service and therefore pole attachments used by a cable operator to provide internet access service are not entitled to the subsidized rates of Section 224(d). Rather, the provision of internet access service constitutes either the provision of telecommunications service, in which case the applicable rates would be those determined under Section 224(e), or neither telecommunication nor cable services, in which case the rates fall completely outside Section 224 and are solely the subject of negotiations between the utility and the cable operator.

[7/] The cable companies rely upon legislative history concerning the inclusion of the term "or use" in 47 U.S.C. § 522(6)(B). However, that amendment did not alter the definition of "video programming" or "other programming service" which must be met for a service to be classified as "cable service," which as discussed above internet access service does not.

B. Allocating The Cost Of Other Than Usable Space

As set forth in Utilities' initial comments, only telecommunication entities should be counted as separate attaching entities for purposes of apportioning the cost of 2/3 of the common unusable pole space under Section 224(e)(2).[8/] By including other entities in this apportionment, the electric utility would become responsible for the portion of these costs attributable to those entities in addition to the cost of 1/3 of the unusable pole space for which it is responsible under Section 224(e)(2), contrary to both the structure and the intent of Section 224(e). Accordingly, where the pole attachment of a cable operator is "used solely to provide cable service," the cable operator should not be included as an attaching entity under Section 224(e)(2) because the attachment is not subject to rates determined under Section 224(e). Such an interpretation is confirmed by the fact, as set forth in Utilities' initial comments, that cable operators using their attachments solely to provide cable service clearly are not included in the term "entities" as used throughout Section 224(e).

In its comments, AT&T Corp. ("AT&T") argues that failing to include cable companies as an attaching entity under Section 224(e)(2) where their attachments are used solely to provide cable service would result "in direct violation of the statutory requirement" that attaching entities under Section 224(e)(2) are to be responsible for no more than 2/3 of the cost of the unusable pole space.[9/] That is simply incorrect. As already noted, the language of Section 224(e) mandates that attaching entities within the meaning of Section 224(e)(2) are to be limited to telecommunication

---

[8/] Ohio Edison Comments at 36-38; Union Electric Comments at 34-35.

[9/] See Comments of AT&T Corp. at 11-12.

entities, and such entities do not become responsible for more than 2/3 of the cost of the unusable pole space by not including cable operators among them. Rather, excluding cable operators who use their pole attachments solely to provide cable service ensures that the electric utility will not be responsible for more than 1/3 the cost of unusable pole space in accordance with Section 224(e)(2) and in effect results in the subsidy provided for such cable operators by Congress under the Act being spread among the electric utility and telecommunication entities.

To briefly expound on this point, AT&T claims that excluding the cable operator from the Section 224(e)(2) calculation results in the electric utility bearing only about 25% of the cost of unusable pole space because the cable company rate under Section 224(d) pays the utility for about 8% of the cost of the unusable pole space. But this fact does not result in telecommunication entities subject to Section 224(e)(2) bearing more than 2/3 of the unusable pole space cost as mandated by that Section. However, to include the cable operator as an attaching entity under Section 224(e)(2) would result in the electric utility bearing more than 1/3 of the cost contrary to the mandate of Section 224(e)(2). To take as an example, assume that there are two telecommunication entities subject to Section 224(e)(2) such that each would be responsible for 1/2 of the cost of 2/3 of the unusable space under Section 224(e), or 1/3 of the cost of the unusable pole space. If a cable operator which used its attachments solely to provide cable service were also included as an attaching entity, each telecommunication entity would become responsible for only about 22% of the cost of the unusable pole space (i.e., 1/3 of 66%). The cable operator, however, accepting AT&T's figure, would only pay the electric utility the cost for about 8% of the unusable space and, as a result, the

utility would bear about 48% of the cost of the unusable pole space, much more than the 33% mandated by Section 224(e)(2).

In short, the Commission should not include as an attaching entity under Section 224(e)(2) cable operators whose pole attachments are "used solely to provide cable service."

C. Allocation Of Usable Space

Utilities in their initial comments urged the Commission to expressly allow electric utilities to charge for more than one foot of usable space for communication attachments where the method of attachment requires the allocation of more than one foot. A prime example of such an occurrence is the practice of many communication companies to tightly pull their fiber optics cable such that the cables interfere with attachments above them properly hung with the required sag.[10/] Some commenters, however, urge the Commission to take the opposite tack and to reduce the amount of usable pole space allocated to each communication attachment. The Commission should reject such attempts which would greatly aggravate the difficulty that Utilities already experience in assuring the proper separation of communication attachments made to their poles.

ICG Communications, Inc. ("ICG") argues that "communications attachments should only be allocated six inches of usable pole space" because, according to ICG, the National Electric Safety Code ("NESC") never requires more than six inches of

[10/] Ohio Edison Comments at 32-34; Union Electric Comments at 30-31.

clearance between communication cables.[11/] ICG, however, overlooks numerous practical considerations that mandate the allocation of at least one foot of usable space for communication cables. First, and foremost, is that the NESC requires this separation not just at the poles themselves but throughout the entire span between adjacent poles. The distance between adjacent distribution poles will generally vary from about 100 to 250 feet. To ensure proper separation throughout this span inevitably will require the cables to be placed further apart on the pole itself than the minimum separation mandated by the code. This is certainly true where different tension is employed in running adjacent cables such as tightly pulled fiber optics cable. It is also necessary to place cables further apart than the minimum separation required by the code in order to maintain minimum separation requirements under adverse as well as normal weather conditions. Ice and wind loadings on cables will vary significantly depending on the size and weight of the cable.[12/] Accordingly, cables having proper separation under normal weather conditions can suddenly violate separation requirements under adverse weather conditions, such as those often experienced in the service areas of both Ohio Edison and Union Electric.

Equally important, equipment or large amounts of extra cable bundled together may reduce the clearance at various points along the cable. For example, cable television operators have traditionally hung amplifiers on their cable which require additional space to be maintained between adjacent cables in order to ensure proper separation at the point where the amplifiers are hung. Similarly, communication

---

[11/] Comments of ICG Communications, Inc. at 39-41.

[12/] As noted in Ohio Edison's comments, doubling the radius of a cable increases the circumference on which ice can form by a factor of four. Ohio Edison's Comments at 24.

companies hanging fiber optics cable will often bunch large amounts of extra cable together at various points along the cable run, several inches in diameter, in order to have extra cable available for various exigent circumstances.[13/] This practice also serves to reduce the clearance at various points along the cable therefore requiring cable communication companies to maintain more than the minimum separation specified by the code between adjacent cables.

Further, just to attach cables or to overlash existing cables requires about one foot of space between adjacent cables. For example, overlashing is accomplished by traversing a machine along the existing cable which overlashes it with the additional cable. Further, the initial cable is often installed in an analogous manner; a plain wire is strung between adjacent poles and a machine traversing this wire overlashes it with the cable. Additional space between adjacent cables is necessary to use such a machine and thus this constitutes another practical reason why the Commission should require the allocation of at least one foot of usable space for a communication cable.

Finally, both Ohio Edison and Union Electric often find themselves, much to their dismay, in the middle of disputes that arise between other entities with attachments to their poles. These disputes may relate to separation between adjacent attachments or other matters. In this regard, Union Electric has been advised by certain entities attaching to its poles that a foot of clearance between adjacent attachments is necessary for them to perform maintenance and other work on their attachments. Although ICG may claim that less space is required, its maintenance and work practices

[13/] Communication companies provide extra fiber optics cable in their stringing of cable because fiber optics cable is much more difficult to splice than regular copper cable.

may differ from those of other attaching entities. The net result is that any reduction in the clearance between adjacent attachments will only serve to increase the number of disputes among attaching entities that electric utilities are increasingly finding themselves being drawn into to resolve.

Accordingly, the Commission should reject ICG's attempt to reduce the allocation of usable space for communication cables. Such a reduction ignores numerous practical considerations and would only serve to exacerbate the difficulties that Utilities already experience in policing the separation among adjacent communications cables.[14/]

MCI takes a different tack than ICG but with an equally erroneous result. MCI argues that usable space on a pole should be artificially increased by one foot for each potential facility that could be overlashed onto original attachments. It urges the Commission to adopt presumptions that would increases the usable space by approximately six feet over and above the actual usable space on the pole, thereby greatly reducing the rates that electric utilities could charge per attachment even absent any overlashing.[15/] There is, however, no rationale basis for adopting such an approach. As discussed above, a single communications attachment as a practical matter requires

---

[14/] ICG also argues that the Commission should require electric utilities to allow communication companies to attach cables in the electric supply space at the top of the pole above the 40-inch safety space. See Comments of ICG Communications, Inc. at 41-43. Utilities strongly object to allowing communication workers to work in the electric supply space of a pole because of the potential impact on the reliability of their electric supply systems. Moreover, the principles for providing access were addressed by the Commission in Docket No. 96-98 and are not properly brought forth in this docket which concerns solely rates.

[15/] See MCI Comments at 10, Table 1.

at least one foot of actual – not MCI's artificial – pole space absent any overlashing. Therefore, under Section 224(e)(3), the utility pole owner is entitled to charge the attaching entity for one foot of actual usable pole space regardless of whether the original attachment is overlashed.

Moreover, such a result is only right and reasonable since the one foot of pole space is not available for the attachment of electric supply conductors. To take as an example, assume that four single, not overlashed, communication cables (including cable television) occupy all the remaining usable space on a pole not occupied by electric supply cables. Under MCI's artificial approach, the electric utility would only be able to charge for roughly 1/3 of the usable space occupied by the four cables. It could not charge for the other 2/3 of the usable space occupied by the four cables even though that space is completely unavailable for attaching electric supply cables. Indeed, under the Commission's rules, if the electric utility needed to add an additional supply conductor to the pole, it would be responsible for the costs of installing a taller pole even though it was only being reimbursed for 1/3 of the usable pole space not then occupied by electric supply cables. Thus, MCI's proposed artificial usable space methodology plainly leads to unreasonable and unfair results and should be rejected by the Commission.

MCI goes even further by arguing that, based on the apportionment of the cost of 2/3 of the unusable space to telecommunication carriers under Section 224(e)(2), electric utilities should be allowed to use only 1/3 of the pole's usable space and must pay for the installation of a taller pole to the extent they need more pole space.[16/]

[16/] MCI's Comments at 15.

Such an interpretation turns Section 224 on its head and makes electric utilities second-class citizens on their own poles. There is absolutely no basis for MCI's position. MCI points to no evidence that Congress intended the apportionment of the cost of unusable pole space to mirror the allocation of the cost of the usable pole space. Indeed, if that had been Congress' intent, there would have been no need for two different approaches for allocating the cost of usable and unusable pole space as reflected in Sections 224(e)(2) and (3). Only a single approach would have been necessary.

Rather, it is obvious that Congress recognized that attaching entities benefit equally from the unusable pole space regardless of the amount of usable space required by their attachments. Absent attaching to the electric utility pole, each attaching entity would have to install its own pole with generally the same amount of unusable space as the electric pole. Thus, MCI's attempt to limit electric utilities to no more than 1/3 or the usable space on their own poles must be rejected by the Commission as being contrary to the Act.

D. Rights-Of-Way Issues

Both WinStar Communications, Inc. ("WinStar") and Teligent, L.L.C. ("Teligent") argue that the Commission should broadly define rights-of-way to include access to roof tops. However, access issues were addressed in the First Report and Order issued in Docket No. 96-98 and are not a proper topic in this docket focused on rates.

Moreover, the Commission has clearly and properly rejected WinStar and Teligent's position that rights-of-way should be defined to include access to roof tops in its

First Report and Order. The Commission's response to the argument advanced there by WinStar was direct and unambiguous:

> We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for installation of a telecommunications carrier's transmission tower . . . . The intent of Congress in section 224(f)(1) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by a utility.

First Report and Order, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 15499, ¶ 1185 (footnotes omitted).

The Commission was entirely correct in rejecting the proposition that rights-of-way include building roof tops and should promptly do so again. As Ohio Edison noted in its reply comments filed with respect the to NPRM for the First Report and Order, the term "right-of-way" has a very specific meaning in the electric utility industry; it refers to "a specific pathway, often by grant of easement over property owned in fee by others, for specific transmission and distribution conductors. It most certainly does not include any utility buildings or power plants."[17/] It is a well established principle of statutory construction that absent contrary legislative intent, Congress intends that words used in a statute are to be interpreted in accordance with their normal usage. See McNally v. United States, 483 U.S. 350, 358-59 (1987); Indiana-Michigan

---

[17/] See Ohio Edison Reply Comments at 12. The Commission in rejecting WinStar's proposition in its First Report and Order cited to Ohio Edison's reply comments. See note 2898.

Power Co. v. U.S. Department of Energy, 88 F.3d 1272, 1275 (D.C. Cir. 1996). Neither WinStar nor Teligent have provided any evidence that Congress intended that all access to building tops be included within the scope of the term "right-of-way" as used in Section 224(f)(1).

Indeed, to the contrary, Congress has used the term right-of-way in the context of Section 224 in its usual and and accepted sense – as a pathway for wires and cable. In the initial 1978 enactment of Section 224, the Senate Report stated that "S. 1547, as reported, would not require the Commission . . . to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire . . . ."[18/] Further, the term "utility" was defined in the 1978 legislation to be a regulated entity "who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication." The 1996 amendment of Section 224 retained as part of the definition of utility this same identical language which links rights-of-way with wire communication. Thus, Congress has clearly used the term right-of-way in Section 224 as that term is used and understood in the utility industry, as a pathway for wires and cable and not access to building roof tops.[19/]

[18/] S. Rep. No. 580, 95th Cong., 2d Sess. at 16 (1978), reprinted in 1978 U.S.C.C.A.N. 109, 124 (internal quotation omitted) (emphasis added).

[19/] In essence, WinStar and Teligent argue that because they need to place microwave antennae on rooftops in order to be successful from a business standpoint, rooftops must be included in the term "right of way." See, e.g., WinStar Comments at 6. The Commission, however, rejected an identical argument made by cable operators prior to the initial enactment of Section 224:

> The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not suf-

Footnote continued on next page

Moreover, WinStar and Teligent's arguments are based on the faulty premise that electric utilities control rights-of-way on the roof tops of buildings. Neither Ohio Edison nor Union Electric generally own or control rights-of-way on building roof tops. Further, to the extent Utilities do have access to roof tops, that access is controlled by the building owners and limited to specific electric utility related services and would not encompass wireless attachments by third parties. Utilities have been provided no authorization by the building owners to allow third parties access to the roof tops of their buildings. Such third party access would not only violate the owner's security of the building but also the building owner's expectation to compensation for use of its building space.

CONCLUSION

For the reasons previously set forth in Utilities' initial comments, the Commission should adopt negotiated, market-based rates for implementing Section 224(e). If it were to adopt a formulaic-rate methodology, the Commission should adopt

---

Footnote continued from previous page

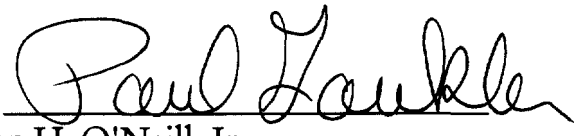
> ficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

California Water & Tel. Co., 64 F.C.C. 2d 753, 789 (1977). Moreover, the Congress clearly accepted the Commission's position, because it cited this passage in reasoning that an amendment to the Communications Act was required in order to extend the Commission's jurisdiction to pole attachments. See S. Rep. No. 580 supra, at 14. Thus, WinStar and Teligent's need to locate microwave antennae on rooftops does not make a rooftop a "right of way."

methodologies based on forward-looking economic costs as set forth in Utilities initial comments and these reply comments.

Submitted by:

OHIO EDISON COMPANY and
UNION ELECTRIC COMPANY

By 

John H. O'Neill, Jr.
Paul A. Gaukler
Norman J. Fry
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8304

Their Attorneys

Rick C. Giannantonio, Esq.
John F. Hamilton
Ohio Edison Company
76 South Main Street
Akron, Ohio 44308
(330) 384-5893

William J. Niehoff, Esq.
Union Electric Company
1901 Chouteau Avenue
P.O. Box 66149(M/C 1310)
St. Louis, Missouri 63166-6149
(314) 554-2514

October 21, 1997

506752-01 / DOCSDC1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CC Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply Comments Of Ohio Edison Company and Union Electric Company were served on the persons shown on the attached Service List by U.S. mail, first class, postage prepaid, this 21st day of October 1997:

Paul A. Gaukler
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8304